Regulatory Guidance Letter 88-13

SUBJECT: National Environmental Policy Act (NEPA) Scope of Analysis and Alternatives

DATE: November 3, 1988

EXPIRES: December 31, 1990

On February 3, 1988, the Department of the Army issued new NEPA implementation regulations governing its regulatory responsibilities (33 CFR Parts 230 and 325). This revision concluded an effort begun four years earlier to clarify and streamline the NEPA procedures applied to the Army's regulatory program. When many years of discussions between the Army and EPA failed to resolve their differences, EPA referred the regulation to the Council on Environmental Quality (CEQ) pursuant to Section 309 of the Clean Air Act. The most prominent issues in that referral were what scope of analysis the district engineer should use when determining whether or not an environmental impact statement (EIS) should be prepared for regulatory actions and to what extent the district engineer should consider alternatives to those actions in the context of the scope of analysis.

The language of the new regulation is meant to assist district engineers in determining what part of a project they should consider when deciding whether or not to prepare an EIS, and what to evaluate within the EIS. This decision will also affect which impacts and alternatives must be evaluated. Under the new regulation, the district engineer is instructed to limit the scope of analysis to the specific activity requiring an Army regulatory permit and any additional portions of the entire project over which there is sufficient Federal control and responsibility to warrant NEPA review. This limiting of the scope of analysis recognizes that, notwithstanding the link between issuance of a permit and project construction, NEPA was not intended to apply to a purely non-Federal activity.

The balance struck by the new regulation is based on recent judicial rulings clarifying, for NEPA purposes, the limits of "Federal action" in a Federal regulatory permitting context. One of these judicial rulings, Winnebago Tribe of Nebraska v. Ray, involved a proposal by the Nebraska Public Power District to construct a 67-mile transmission line through portions of Iowa and Nebraska. The "major Federal action" at issue was the requirement for a permit under Section 10 of the Rivers and Harbors Appropriation Act of 1899 to authorize construction of the portion of the powerline crossing the Missouri River. The Corps decision to issue the permit without preparing an EIS was challenged because the Environmental Assessment (EA) was limited to the environmental impacts of portions of the powerline requiring a Section 10 permit, and did not address the remaining 65-miles of the powerline. On appeal to the Eighth Circuit, the Tribe argued that because the entire project, could not be completed without the Missouri River crossing, and the river crossing could not be constructed without a Section 10 permit the Corps "wield[ed] sufficient control over the entire project to require project-wide environmental analysis." The Eighth Circuit rejected this argument and ruled that the portions of the transmission line that did not require a Section 10 permit were outside the scope of review for NEPA purposes.

In reaching its conclusion, the Eighth Circuit considered:

The degree of the Corps discretion over the entire project; the amount, if any, of direct Federal financial aid given to the project; and whether "the overall Federal involvement with the project was sufficient to turn essentially private action into Federal action."

Applying these factors, the court concluded that the Corps broad discretion under the Rivers and Harbors Act did not encompass areas outside the limit of Section 10 jurisdiction; that there was no direct or indirect Federal funding of the project; and that there was no Federal involvement in the portion of the project not within Section 10 jurisdiction that would federalize the essentially private activity.

These factors, in addition to the factors listed at paragraph 7(b) of Appendix B to 33 CFR Part 325,are offered to provide guidance on making determinations on whether the Government has sufficient control and responsibility for portions of the project beyond the limits of Corps jurisdiction so as to turn an essentially private action into a Federal action, thereby triggering the requirements of NEPA for the entire project. Paragraph 7 of Appendix B to 33 CFR Part 325 states that:

Typical factors to be considered in determining whether sufficient "control and responsibility" exists include:

Whether or not the regulated activity comprises "merely a link" in a corridor type project (e. g., a transportation or utility transmission project).

Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.

The extent to which the entire project will be within Corps jurisdiction.

The extent of cumulative Federal control and responsibility.

Once the district engineer has determined the appropriate portion of the project to be evaluated (scope of action) the district engineer needs to consider alternatives to that action and evaluate impacts (primary, secondary and cumulative) in the appropriate NEPA analysis, such as the EA, EIS, and decision on whether to prepare a finding of no significant impact or to require an EIS. However, when analyzing secondary (indirect) impacts, the district engineer should consider the strength of the relationship between those impacts and the regulated portion of the activity (i.e., whether or not the impacts are likely to occur even if the permit is not issued) in deciding the level of analysis and what weight to give these impacts in the decision. These considerations are particularly relevant where the NEPA analysis is extended to areas outside Corps jurisdiction. In a parallel situation, the court in Mall Properties, Inc. v. Marsh faulted the district engineer for giving too much weight to socioeconomic impacts that were "attenuated" from the purpose of the statute authorizing us to take the permit action. The court distinguished

between socioeconomic impacts "proximately-related" to the permit action, and those impacts which, even though this was the only site within the market area where a shopping mall could be built, were too far attenuated from the original purpose of the statute (i.e., impacts on the aquatic environment) to be heavily weighed in the Corps decision. (The socioeconomic impacts on downtown New Haven were the primary basis for denial of that permit. The court noted that these impacts would occur whether the mall were built in wetland or upland.)

The attenuation concept should also be applied to NEPA analysis. When considering what weight the impacts of a project, requiring a permit will be given in NEPA decisions, district engineers should consider whether another project, not requiring a permit, could likely occur at the site or in the vicinity, and whether its impacts would be similar to impacts of the project requiring a permit.

Another issue arising from EPA's referral was the misconception that consideration of alternatives would always be restricted to those alternatives agreeable to the applicant. While the Corps should recognize the applicant's purpose and need, and evaluate those alternatives available to the applicant, that meet this purpose and need, it is sometimes necessary, under NEPA, to analyze alternatives beyond the applicants capability in order to make an informed public interest decision. Such alternatives should be included in the category of "deny the permit" where it is appropriate to examine whether the public benefits to be accrued from the applicant's project are likely to be provided elsewhere by another project, even if the permit is not issued.

This is specifically stated in Appendix B, paragraph 9(c)(5). Though not specifically stated in paragraph 7, which describes how alternatives should be considered in the environmental assessment, the same basic guidance applies. District engineers should consider alternatives not available to the applicant when they need to know what opportunities will be lost to the public if they deny the permit.

This guidance expires 31 December 1990 unless sooner revised or rescinded.